Criminal Law
INVOLUNTARY MANSLAUGHTER

An Overview

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The Law Commission

Consultation Paper No 135

Criminal Law
Involuntary Manslaughter

An Overview

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INVOLUNTARY MANSLAUGHTER: AN OVERVIEW

INTRODUCTION

1. The Law Commission publishes simultaneously with this Overview a full Consultation Paper on Involuntary Manslaughter.[1] That Consultation Paper contains a detailed, and necessarily rather lengthy, analysis of the present law in England and Wales and in a number of comparable foreign jurisdictions, and then invites comment on a range of provisional proposals for its reform.

2. The purpose of this Overview is two-fold. First, to provide a guide and summary for readers of the Consultation Paper, who may find it helpful to read this Overview before embarking on the Consultation Paper itself. Secondly, however, it is intended to serve as a much shorter account of the main features of the present law, and of the principal policy issues which are connected with it. This inevitably means that in this Overview we have had to state matters somewhat summarily and dogmatically and without setting out the full arguments contained in the Consultation Paper. We hope, however, that this Overview provides a sufficient account of the issues for those who do not have the time or inclination to read the whole of the Consultation Paper. At each point, for those who wish to pursue a particular issue more fully, cross-references are provided to the relevant paragraphs of the Consultation Paper.

SCOPE AND BACKGROUND OF THE PROJECT

3. The Consultation Paper which accompanies this Overview represents the next step in the second stage of the Law Commission's undertaking to codify the criminal law.[2] It is concerned with what is, perhaps not entirely happily, called "involuntary manslaughter". It is *not* concerned with those parts of the law of manslaughter which depend on the presence of the necessary intention for murder, coupled with either diminished responsibility, provocation, or the agreement to enter into a suicide pact.[3]

4. The law of involuntary manslaughter today has two, separate, main branches: causing death in the course of doing an unlawful act and causing death by gross negligence or recklessness. We consider the law of unlawful act manslaughter in Part II of our Consultation Paper, and that of gross negligence or reckless manslaughter in Part III.

5. The law affecting each of these two types of manslaughter gradually evolved from the early days, when any homicide, even the entirely accidental causing of death, involved penalty.[4] Involuntary manslaughter is still anomalous in our criminal law because, in

[1] Law Commission Consultation Paper No 135, Involuntary Manslaughter (1994): hereafter, "LCCP No 135".

[2] See LCCP No 135, paras 1.3-1.4.

[3] LCCP No 135, paras 1.1-1.2 and 1.5-1.8.

[4] LCCP No 135, para 1.10.

nearly every case,[5] the accused will not have intended or foreseen that his or her conduct might cause death. Instead, liability for a serious criminal offence follows from the *consequence* of the accused's conduct, coupled with an element of "unlawfulness" in this conduct.

6. The rules which define this element of "unlawfulness" have been developed by the courts over the years in a piecemeal fashion. This has resulted in a large degree of uncertainty and inconsistency in the law relating to both branches of involuntary manslaughter. The problems are now so severe that in two recent judgments, one concerning unlawful act manslaughter and another concerning gross negligence manslaughter, different sections of the Court of Appeal (Criminal Division) have urged that the law be subjected to scrutiny and reform as a matter of urgency.[6]

7. Frequently, these difficulties in determining and applying the legal rules have obscured important policy issues which are connected to the concept of involuntary manslaughter as a whole, and to each branch of this offence. In our Consultation Paper, we first examine the present law, and then turn to consider these policy issues,[7] before we make provisional proposals for reform of the law.[8] In addition, because they raise particular problems and policy issues of their own, we consider separately two specific instances of involuntary manslaughter, namely motor manslaughter[9] and death caused by the activities of corporations.[10]

UNLAWFUL ACT MANSLAUGHTER

8. The basis of this type of manslaughter is that the defendant killed by or in the course of performing an unlawful act.[11] Its alternative name, "constructive manslaughter", draws attention to the fact that, for this crime, guilt is "constructed" from the defendant's culpability for an unlawful act which was quite unconnected, in terms of intention or foresight, to the causing of death. This concept is unattractive in principle because it allows liability for a serious criminal offence to turn on the chance that death resulted. Historically, it is related to a rule which provided that any person who killed in the

[5] Except where it involves subjective recklessness, for which see LCCP No 135, paras 3.168-3.170, and 5.16-5.21, summarised in paras 53-55 and 72 of this Overview.

[6] *Scarlett* [1993] 4 All ER, per Beldam LJ at pp 631E-F and 638A, (for a summarised account of this case see paras 13-14 of this Overview); and *Prentice* [1993] 3 WLR 927, per Lord Taylor CJ at pp 952G-953B (paras 39-44 of this Overview): see LCCP No 135, paras 1.17-1.19.

[7] See LCCP No 135, primarily paras 2.52-2.56 and 5.1-5.15 for unlawful act manslaughter; and paras 5.30-5.71 for the general law of involuntary manslaughter, and gross negligence manslaughter in particular.

[8] A summary of these proposals can be found in paras 70-90 of this Overview.

[9] LCCP No 135, paras 3.156-3.167 and 5.22-5.29; summarised in paras 45-55 and 73-75 of this Overview.

[10] LCCP No 135, Part IV and paras 5.72-5.92; summarised in paras 56-67 and 89-90 of this Overview.

[11] LCCP No 135, paras 2.1-2.4.

course of committing a felony was guilty of murder. This rule was abolished by Act of Parliament in 1957.[12]

9. At one time it was thought that the commission of a *tort*, if it caused death, was sufficient to render a person guilty of manslaughter.[13] Now, however, it is fairly well established that the accused must have committed a *crime* of some sort,[14] although some dicta of the Court of Appeal in the case of *Cato*[15] cast doubt on the certainty of this principle. In that case Lord Widgery CJ suggested, obiter, that the appellant's act of injecting the deceased, at his request, with heroin which the deceased had provided, would have been capable of constituting the requisite unlawful act for manslaughter even though it was not a criminal offence in itself. In the leading House of Lords case in this field of law,[16] the question whether the unlawful act need be a crime was not raised. Some doubt therefore remains on this issue.[17]

10. For many years judges have been uncomfortable about the harshness of this type of manslaughter, and have tried in various ways to limit its scope. For example, in 1937 the House of Lords held[18] that negligent acts, even those which were capable of constituting statutory criminal offences (such as dangerous driving), would not automatically be sufficient to found a conviction for manslaughter where death was caused. Instead, it would be necessary to prove that the defendant's negligence had been of a very high level, and in such a case the prosecution would have to proceed under the second head of involuntary manslaughter, gross negligence manslaughter, considered in Part III of our Consultation Paper.

11. Another rule which judges have introduced to limit the width of unlawful act manslaughter is that the act which caused the death, in addition to being unlawful, must also have been dangerous.[19] In one leading Court of Appeal case it was said: "the unlawful act must be such that all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm".[20] However, this additional element obviously does not go very far to reduce the constructive nature of this crime because it does not require that the defendant *himself* must have recognised that his act was dangerous, and because it only

[12] Homicide Act 1957, s 1(1). All distinctions between felonies and misdemeanours were abolished by s 1 of the Criminal Law Act 1967.

[13] *Fenton* (1830) 1 Lew 179: see LCCP No 135, para 2.5.

[14] *Lamb* [1967] 2 QB 981: see LCCP No 135, para 2.6.

[15] [1976] 1 WLR 110: see LCCP No 135, para 2.8.

[16] *Newbury* [1977] AC 500: see LCCP No 135, paras 2.9-2.16.

[17] LCCP No 135, paras 2.17-2.20.

[18] In *Andrews v DPP* [1937] AC 576: see LCCP No 135, para 2.7.

[19] See LCCP No 135, paras 2.21-2.26.

[20] *Church* [1966] 1 QB 59, 70.

requires that *some* harm might have been expected to result from the act, but not serious injury, and certainly not death.

12. In the past judges have also tried to restrict liability for this crime by the manipulation of the normal rules of causation;[21] by the stipulation that only acts that were unlawful *because* they were dangerous would suffice;[22] and by the introduction of a rule that the act must have been *directed at* the deceased.[23] However, none of these rules have been applied consistently by the courts.

13. All these reforms have been developed in a piecemeal and uncoordinated manner by the courts. As a result, as the very brief summary of the present law given here demonstrates, this crime is now characterised by uncertainty and also by a number of distinct, but inter-related elements all of which must be proved by the prosecution. Sometimes these elements can become confused, as occurred recently in the case of *Scarlett*.[24] A publican was convicted of manslaughter following an incident in his pub. Shortly after closing time he asked the deceased to leave. He refused, and so the appellant bundled him out of the bar and into the lobby, where he fell down a flight of stairs, fatally injuring his head. The case against the appellant was that he had used excessive force in removing the deceased from the bar, and had thereby committed an unlawful act which caused death. At the trial the judge directed the jury perfectly properly that the unlawful act must have been one "which all reasonable people would inevitably realise must subject the victim to some form of harm even if it is not serious...".[25] However, he failed to tell them that, for a finding of assault by use of excessive force, it must be shown that the accused intended to apply unlawful force.[26] If he mistakenly believed that his use of force was justified, he was entitled to be acquitted, even if his belief was unreasonable.

14. It is possible that the judge, in directing the jury, confused two of the elements of the crime: that the act must have been *unlawful*, which in this case required looking into the accused's mind to determine that he intended to apply excessive force; and the element that the act must have been *dangerous*, which required the jury to judge the act from the viewpoint of an objective observer. The Court of Appeal quashed the conviction, and remarked:

[21] For example, in *Bennett* (1858) 8 Cox 74 and *Martin* (1827) 3 Car & P 211: see LCCP No 135, paras 2.27-2.28.

[22] *Van Butchell* (1829) 3 Car & P 629: see LCCP No 135 paras 2.29-2.38.

[23] *Dalby* [1982] 1 WLR 425: see LCCP No 135, paras 2.39-2.42.

[24] [1993] 4 All ER 629: see LCCP No 135, paras 2.43-2.47.

[25] [1993] 4 All ER 629, 634E.

[26] *Gladstone Williams* [1987] 3 All ER 411.

> Because of the dire consequences of the deceased's fall, there was a real risk that the jury might be persuaded not only that the force applied was excessive but that the appellant's actions were likely to cause injury. It is important to emphasise that the question whether the action of the appellant was unlawful and the question whether it was dangerous have to be considered separately... .[27]

15. Our provisional conclusion is that this type of manslaughter should be abolished, because it is characterised by confusion and uncertainty and, more importantly, because it is based on the antiquated and discredited principle of constructive liability.[28] If it continues to be thought appropriate on policy grounds that the law should retain the power to impose punishment to mark the fact that the accused has caused a death, even where he or she neither foresaw nor intended that death, then our provisional view is that this policy should be pursued through the alternative branch of involuntary manslaughter, gross negligence manslaughter, which we discuss next. And in case readers think that where a person has inadvertantly caused death *by an act of violence* the law should properly deal with him more severely by virtue of the accident of death having occurred, we provisionally propose in Part V of our Consultation Paper[29] a form of offence to deal with this situation. If readers believe that unlawful act manslaughter should be retained in some form or another, we ask them to address with clarity the problems we point out in Part II of our Paper.

GROSS NEGLIGENCE MANSLAUGHTER

Introduction

16. Part III of the Consultation Paper is concerned with the law which at present governs all cases of involuntary manslaughter other than unlawful act manslaughter. Here the basic requirement is that a person must have caused the death of another through his or her "gross negligence" or "recklessness". It is at present uncertain what is meant by each of these fault terms, or even whether the two terms describe separate categories of manslaughter or are just different ways of describing the same thing. For these reasons in Part III of the Consultation Paper we devote considerable space to an examination of the cases in an attempt to ascertain the present position. Our conclusions are summarised here.

17. There are four key cases in the past 70 years which can be seen as markers in the development of the law of gross negligence or reckless manslaughter. In the first of these, *Bateman*,[30] the Court of Appeal confirmed that the appropriate test was one based

[27] [1993] 4 All ER 629, 673B-C.

[28] LCCP No 135, paras 2.52-2.56 and 5.1-5.7.

[29] Paras 5.8-5.15, and see below, para 71.

[30] (1925) 19 Cr App R 8: see LCCP No 135, paras 3.4-3.5.

on *gross* negligence, as opposed to any lesser degree of carelessness. In *Andrews v DPP*[31] the House of Lords approved this approach, and Lord Atkin suggested that the word "recklessness" would be a good way of describing gross negligence to juries. In some subsequent cases judges tended to focus on recklessness rather than on gross negligence, and in 1983 the House of Lords held in the motor manslaughter case of *Seymour*[32] that recklessness was indeed the relevant fault term. They also adopted a fairly rigid definition of recklessness, and suggested that in all cases juries ought to be directed in the terms of this definition. Recently, the ground may have shifted once again with the Court of Appeal decision in *Prentice*[33] which appears to reject this guidance by the House of Lords, at least with regard to certain types of case, and to have returned to the earlier *Bateman* test of gross negligence.[34] In Part III of the Consultation Paper we trace the development of the law with particular reference to these four cases. A similar approach is adopted here.

R v Bateman

18. The early case-law indicated that to cause death by any lack of care whatsoever would amount to manslaughter.[35] The development of the modern law can be traced to cases in the nineteenth century in which judges began to use the language of "gross negligence".[36] They were concerned to establish that a higher degree of fault ought to be necessary to incur criminal liability for manslaughter than that sufficient for civil liability for negligence. In due course, in the case of *Bateman*[37] the Court of Appeal held that gross negligence manslaughter involved the following elements:- (1) the defendant owed a duty to the deceased to take care; (2) the defendant breached this duty; (3) the breach caused the death of the deceased; and (4) the defendant's negligence was gross, that is, it showed such a disregard for the life and safety of others as to amount to a crime and deserve punishment.

19. This formulation was approved by the House of Lords in *Andrews v DPP*[38] and formed the basis of the modern law of gross negligence manslaughter. It is therefore important to determine exactly what it involved, and to analyse each of the elements which it required to be proved.

[31] [1937] AC 576: see LCCP No 135, paras 3.62-3.64.

[32] [1983] 2 AC 493: see LCCP No 135, paras 3.99-3.104.

[33] [1993] 3 WLR 927: see LCCP No 135, paras 3.121-3.155.

[34] At the time our Consultation Paper is published, an appeal by Dr Adomako, the only unsuccessful appellant in the four appeals then determined by the Court of Appeal, is awaiting a hearing in the House of Lords.

[35] See Lord Atkin's exposition in *Andrews v DPP* [1937] AC 576, 582.

[36] For example, *Williamson* (1807) 3 C & P 635.

[37] (1925) 19 Cr App R 8: see LCCP No 135, paras 3.4-3.5.

[38] [1937] AC 576.

The duty to take care

20. Although the *Bateman* formulation referred to the requirement that the accused owed a "duty...to take care" to the deceased, our scrutiny of the case-law[39] revealed that the meaning of these words in this context is not entirely clear. This uncertainty is particularly unfortunate because in *Prentice*[40] the Court of Appeal used the expression "manslaughter by breach of duty" in relation to gross negligence manslaughter without explaining clearly what it meant by it.

21. Our examination of the case-law has led us to the following conclusions. In cases where the death was caused by the accused's failure to act, these words appear to restrict criminal liability to those cases where the accused owed a duty recognised by the criminal law to the deceased.[41] Thus liability for death caused by omissions is probably confined to cases in which the accused was closely related to the deceased,[42] or caused death through a breach of a contractual duty owed by him or her,[43] or had undertaken, by way of a promise or simply by embarking on a course of action, to care for the deceased.[44]

22. In cases in which the accused was an expert, for example a doctor, and caused the death of a person, for example a patient, who had placed reliance on his or her expertise, it is also probably necessary to show that the accused owed to the deceased a "duty...to take care".[45] In such cases, it is said that the accused should owe a duty to the deceased "to use diligence, care, knowledge, skill and caution...".[46]

23. In all other types of case it is probable that the words "duty...to take care" mean no more than that the accused should not have been care*less*, or negligent (in a non-technical sense of the word), in his or her conduct.[47]

Breach of the duty: the standard of care

24. The second element of the *Bateman* formulation, that the accused breached the duty owed by him or her to the deceased, inevitably raises the issue of the standard of care which could be expected from him or her, since there can only have been a breach if the accused's conduct fell below that standard.[48]

[39] LCCP No 135, paras 3.6-3.25.

[40] [1993] 3 WLR 927: see LCCP No 135, paras 3.134-3.139.

[41] LCCP No 135, paras 3.11-3.18.

[42] *Stone and Dobinson* [1977] QB 354.

[43] *Pittwood* (1902) 19 TLR 37.

[44] *Stone and Dobinson* [1977] QB 354.

[45] LCCP No 135, paras 3.19-3.21.

[46] Per Lord Hewart CJ in *Bateman* (1925) 19 Cr App R 8, 12.

[47] LCCP No 135, paras 3.6-3.10 and 3.23-3.25.

[48] LCCP No 135, paras 3.26-3.30.

25. In most cases, the question of the standard of care which ought to be required from the accused has become subsumed within the general test of gross negligence: was the accused's negligence of such a standard as to justify conviction of a serious criminal offence? Our review of the law reveals that it is only in the type of case in which the accused was an expert of some sort that clear guidelines have been set as to the particular standard of care which ought to be expected from him or her.[49] In these cases, the law requires a fair and reasonable standard of care and competence.[50] This standard applies equally to unqualified persons if they have held themselves out as possessing special skills and have voluntarily undertaken to act.[51]

Gross negligence

26. The test for negligence envisaged by the Court of Appeal in *Bateman* was an objective one: the accused's conduct was to be judged against an external standard. By his conduct, he must have exposed the deceased to a risk to her "health and safety".[52] The language used by the court in this and in later cases does not make it clear whether or not the accused had to have been *aware* that he or she was exposing the deceased to such a risk in order to justify conviction.[53]

27. The accused's negligence must have been *gross*, that is, of a very high degree. The precise test for gross negligence has proved difficult to express. In *Bateman* it was put as follows:

> [I]n order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.[54]

This definition is circular: the jury should convict the accused of a crime if his or her behaviour was criminal.

28. Later cases[55] have only confirmed the difficulty of defining gross negligence. In the Consultation Paper we review these later cases and also the law of a number of

[49] LCCP No 135, paras 3.28-3.30.

[50] *Bateman* (1925) 19 Cr App R 8, 12.

[51] *Ibid*, at p 13.

[52] *Bateman* (1925) 19 Cr App R 8, 13, and see LCCP No 135, paras 3.32-3.34.

[53] LCCP No 135, paras 3.33 and 3.69-3.76.

[54] (1925) 19 Cr App R 8, 10-12, and see LCCP No 135, paras 3.35-3.36.

[55] For example, *Andrews v DPP* [1937] AC 576; *Akerele* [1943] AC 255; and *Prentice* [1993] 3 WLR 927: see LCCP No 135, paras 3.36-3.41, and below, para 42(c).

comparable foreign jurisdictions.[56] However, even in the course of this extensive review we were unable to detect any satisfactory formula which had been used or proposed by the courts to help juries to distinguish gross negligence from civil negligence.

Recklessness

29. In our Consultation Paper we suggest that this difficulty of expression may gradually have led to a change in the law.[57] Because judges found it difficult to explain the meaning of "gross negligence" to juries, they instead began to focus on "recklessness" as an alternative fault term.

30. This shift of emphasis can be seen in *Andrews v DPP*.[58] In this case, the House of Lords approved the *Bateman* approach to gross negligence, but Lord Atkin, with whose speech the other Law Lords agreed, suggested that the word "recklessness" was a good way of describing "gross negligence". However, he recognised that "recklessness" could not be used as an "all-embracing" synonym for gross negligence, because it "suggests an indifference to risk, whereas the accused may have appreciated the risk and intended to avoid it and yet shown such a high degree of negligence in the means adopted to avoid the risk as to justify a conviction".[59]

31. In some later cases[60] judges followed this approach and used the word "recklessness" to describe a high degree of negligence. This line of authority therefore suggests that gross negligence, as defined in *Bateman* and *Andrews*, ought to be the sole basis of guilt in manslaughter (apart from unlawful act manslaughter), and that recklessness was being treated as either identical to or a category of gross negligence.[61]

32. Meanwhile, in other cases judges went further, and tried to give detailed definitions of recklessness. In doing so they succeeded, perhaps without intending to, in gradually changing the law which had been applied in *Bateman* and *Andrews v DPP*. For example, in a case in 1977[62] the Court of Appeal formulated a definition of recklessness which was based on the judgment in *Andrews*, but differed from it materially:

[56] LCCP No 135, paras 3.42-3.58.

[57] LCCP No 135, para 3.69.

[58] [1937] AC 576.

[59] [1937] AC 576, 583, and see LCCP No 135, paras 3.62-3.64.

[60] For example, *Larkin* [1941] 1 All ER 217 per Humphreys J at p 219D; *Lamb* [1967] 2 QB 981, per Sachs LJ at p 990; *Cato* [1976] 1 WLR 110, per Lord Widgery CJ at p 114.

[61] LCCP No 135, paras 3.65-3.68.

[62] *Stone and Dobinson* [1977] QB 354: see LCCP No 135, paras 3.75-3.77.

> The defendant must be proved to have been indifferent to an obvious risk of injury to health, or actually to have foreseen the risk but to have determined nevertheless to run it.[63]

It can be seen that the state of mind described in *Andrews* in which "the accused may have appreciated the risk and intended to avoid it and yet have shown such a high degree of negligence in the means adopted to avoid the risk as would justify a conviction"[64] was here rendered as "having foreseen the risk but to have determined nevertheless to run it", clearly a very different mental state. This state of mind, which can be described as "subjective recklessness", figured in many of the tests laid down for gross negligence manslaughter by judges in other cases[65] between 1937, when *Andrews* was decided, and 1983, when the House of Lords determined the case of *Seymour*. Indeed, much of this case-law suggests that subjective recklessness was the *only* appropriate fault term for gross negligence manslaughter, in direct contrast with earlier authority.

33. In the extract from *Stone and Dobinson* quoted in the paragraph above, the Court of Appeal used the word "indifferent" to describe one of the alternative states of mind capable of amounting to recklessness. This word appears quite often in the definitions of recklessness and gross negligence used by judges in other cases in this area of the law.[66] However, its meaning is ambiguous, because it is not clear whether it requires that a person has perceived the risk in question, or whether he may be indifferent about something of which he is not aware.[67]

R v Seymour

34. The law of gross negligence manslaughter prior to 1983, therefore, was characterized by a fair amount of uncertainty and inconsistency. In 1983 the decision of the House in *Seymour*[68] went some way to remove this uncertainty, but at the cost, perhaps, of in some respects increasing, and in others decreasing, inappropriately, the scope of the offence and of introducing a degree of rigidity into the way in which juries would be directed.

35. The case of *Seymour* concerned the mental element required for motor manslaughter, which was a category of gross negligence manslaughter, and therefore subject to the same

[63] [1977] QB 354, 363.

[64] [1937] AC 576, 583.

[65] For example, *Pike* [1961] Crim LR 547 (CA); *Lamb* [1967] 2 QB 981 (CA); *Cato* [1976] 1 WLR 110 (CA); *Smith* [1979] Crim LR 251: see LCCP No 135, paras 3.77-3.82.

[66] For example, *Andrews v DPP* [1937] AC 576, per Lord Atkin at p 583; and *Prentice* [1993] 3 WLR 927; see also LCCP No 135, paras 3.69-3.76, and below, para 43.

[67] See the discussion in LCCP No 135, paras 3.69-3.76.

[68] [1983] 2 AC 493: see LCCP No 135, paras 3.99-3.109.

rules and definition. The House referred to its decision in an earlier case[69] that the ingredients of motor manslaughter and of the statutory offence of causing death by reckless driving[70] were identical. It also referred to two other decisions it had taken in 1981,[71] the combined effect of which was that, for the purposes of the offence of reckless driving, a person was reckless if (1) he did an act which in fact created an obvious and serious risk of injury to the person or substantial damage to property and (2) when he did the act he either had not given any thought to the possibility of there being any such risk or had recognised that there was some risk involved and nonetheless went on to do it. It concluded that, for motor manslaughter (and, by implication, for all cases of gross negligence manslaughter) the appropriate fault term was "recklessness" which should bear the meaning ascribed to it in the 1981 decisions.

36. This judgment changed the law of manslaughter radically. Although the House had purported to follow its 1937 decision in *Andrews*,[72] it had in fact adopted a very different test.[73] This test increased the width of the offence substantially. Under the *Seymour* rule, once the defendant had been shown by his conduct to have created an obvious and serious risk of causing physical injury to some other person, it was open to the jury to find him guilty whether his conduct was a result of mere inadvertence, subjective recklessness or poor judgment. It was no longer open to a defendant to dispute guilt on the ground that his negligence had not been "gross".

37. Paradoxically, however, the *Seymour* test was in some respects *narrower* than the *Andrews* test of gross negligence. First, it was confined to those situations where the defendant *through his own conduct* created an obvious and serious risk of causing physical harm to some person. Secondly, the category of person referred to in *Andrews* who realised there was a risk but was negligent in the means taken to avoid it would escape conviction under the *Seymour* test.

38. For a decade *Seymour* was applied fairly consistently by the courts,[74] although in a few notable cases judges reverted to the previous law and language of gross negligence.[75]

[69] *Government of the United States of America v Jennings* [1983] 1 AC 624.

[70] This offence was created by the Road Traffic Act 1972, s 1(1), as amended by the Criminal Law Act 1977, s 50.

[71] *Caldwell* [1982] AC 341 and *Lawrence* [1982] AC 510.

[72] [1937] AC 576: see para 19 above.

[73] For a slightly more detailed comparison between the two tests, see LCCP No 135, paras 3.105-3.109.

[74] For example, by the Privy Council in *Kong Cheuk Kwan* (1985) 82 Cr App R 18; and by the Court of Appeal in *Goodfellow* (1986) 83 Cr App R 23 and *Madigan* (1986) 83 Cr App R 23: see LCCP No 135, paras 3.110-3.118. In *Reid* [1992] 1 WLR 793 the House of Lords upheld the *Lawrence/Caldwell* definition of recklessness in the context of the statutory offences of reckless driving: see LCCP No 135, paras 3.119-3.120.

[75] For example, in *West London Coroner ex parte Gray* [1988] QB 467: see LCCP No 135, paras 3.113-3.114.

This state of affairs was, however, recently ended by the judgment of the Court of Appeal in *Prentice.*[76]

R v Prentice and others

39. In this case three appeals against conviction were considered together. Two of them involved doctors administering treatment in hospitals. The other was concerned with an electrician wiring up a central heating system. The appeal provided an opportunity for the court to review two questions of almost equal difficulty. First, had *Seymour* effectively replaced the earlier law on the topic as the sole source of the law of "reckless" manslaughter? Secondly, if *Seymour* did not have that radical effect, what had been the terms of the previous law, and what were its terms now?

40. Lord Taylor CJ reviewed the case-law and came to the following conclusions:-

> (1) *Bateman* and *Andrews v DPP* had never been over-ruled;
> (2) The decision in *Seymour* that "recklessness" should have the same definition in motor manslaughter as in the statutory offence of causing death by reckless driving arose from the co-existence at that time of a common law and a statutory offence. The position in relation to motor manslaughter could not be changed by the Court of Appeal. However, the dictum in *Seymour* to the effect that "recklessness" should bear the same meaning in all cases of manslaughter was obiter;
> (3) It was a basic premise of the formulation of "recklessness" applied in *Seymour* that the accused had *himself created* an obvious and serious risk;
> (4) It was also a premise of this formulation that the risk created ought to have been obvious to "the ordinary prudent individual", as opposed to an expert of some sort;
> (5) A person who recognised the existence of a risk and took steps to avoid it in a grossly negligent way would not be convicted by the *Seymour* formulation;
> (6) Therefore, "[l]eaving motor manslaughter aside, ...in our judgment the proper test in manslaughter cases based on breach of duty is the gross negligence test established in *Andrews*...".

41. Unfortunately, it is not entirely clear what Lord Taylor CJ meant by "manslaughter cases based on breach of duty", and thus the extent to which the test outlined in *Prentice* ought to be applied.[77]

42. Further uncertainties arose from Lord Taylor CJ's definition of gross negligence. He did not attempt to give an exhaustive definition, but he did indicate that:

> ...we consider proof of any of the following states of mind in the defendant may properly lead a jury to make a finding of gross negligence:

[76] [1993] 3 WLR 927: see LCCP No 135, paras 3.121-3.155.

[77] LCCP No 135, paras 3.134-3.139.

(a) indifference to an obvious risk of injury to health.

(b) actual foresight of the risk coupled with the determination nevertheless to run it.

(c) an appreciation of the risk coupled with an intention to avoid it but also coupled with such a high degree of negligence in the attempted avoidance as the jury consider justifies conviction.

(d) inattention or failure to advert to a serious risk which goes beyond "mere inadvertence" in respect of an obvious and important matter which the defendant's duty demanded he should address.[78]

43. It is unfortunate that even this passage contains ambiguities which may cause problems in later cases.[79] He said that proof of "indifference to an obvious risk of injury to health" might allow a jury to find gross negligence, but, as we have observed in paragraph 33 above, the word "indifference" is almost as uncertain in its meaning as "recklessness". The meaning of the word "obvious", used in this first limb and also in the fourth limb of the definition, is also uncertain, as Lord Taylor himself observed elsewhere in his judgment.[80] Finally, the court speaks, in example (a) of risk of (*semble*, any) injury, and later on simply of "risk". This prompts the question: risk of what?, and the fear that a very low standard of liability is being created.

44. Leave has been granted to the one unsuccessful appellant to appeal to the House of Lords on the following point of law of general public importance:

> In cases of manslaughter by criminal negligence not involving driving but involving breach of duty is it sufficient direction to the jury to adopt the gross negligence test set out by the Court of Appeal in the present case following *Rex v Bateman*... and *Andrews v Director of Public Prosecutions*... without reference to the test of recklessness as defined in *Reg v Lawrence*... or as adapted to the circumstances of the case?[81]

It may well be that the House of Lords will be able to iron out many of the inconsistencies and uncertainties which we have analysed in Part III of our Consultation Paper, and very briefly summarised here. However, we cannot anticipate what they may say, and in Part V of the Paper we come to our own provisional conclusion that the law has by now become so contorted and involved that a completely fresh start would be

[78] [1993] 3 WLR 927, 937.

[79] LCCP No 135, paras 3.142-3.144.

[80] See para 40(4) above, and LCCP No 135, para 3.143.

[81] *Adomako* [1994] 1 WLR 15.

desirable. We set out there in some detail our provisional recommendations in this regard.

Motor manslaughter

45. Both the judgment in *Prentice*[82] and the certified question for the House of Lords in *Adomako*[83] leave to one side the issue of motor manslaughter.[84] For the last decade the position in this area of the law has been that:

> 1. Liability for manslaughter by killing while driving a motor vehicle was judged on the same basis as liability for the offence of causing death by reckless driving under section 1(1) of the Road Traffic Act 1972.
>
> 2. The test for liability was whether the defendant was driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to another person or of doing substantial damage to property; and in driving in that manner had either given no thought to the possibility of there being any such risk, or had recognised the risk involved but had gone on to take it.
>
> 3. Thus, once the defendant could be shown to have caused that obvious and serious risk, and a person had died as a result of that driving, he would be guilty whether or not he was aware of the risk, and even if the death was the result of mere inadvertence or bad judgment. There was no need to show that his negligence was "gross".

46. The Court of Appeal in *Prentice* consciously refused to apply this test as a statement of the law applying to manslaughter generally, whilst acknowledging that it remained bound by it in the case of manslaughter by driving motor vehicles.[85] Despite this loyalty to binding precedent, the court clearly saw no merit in there being a separate, and much more severe, rule in the special case of motor manslaughter. Nor did the courts which originated what is now the "motor manslaughter" rule argue for it because of any special considerations which related to cases of death caused on the road, because they thought that the rule applied to *all* cases of manslaughter, and not specially to motor manslaughter. Nevertheless, there might be thought to be policy arguments for treating motor manslaughter differently from other unintentional killing, however much the present law to this effect is the result of accident rather than of design. In Part III of the Consultation Paper[86] we put these considerations into context by looking rather more widely at the law which now governs cases in which death is caused on the road. We summarise our conclusions below.

[82] [1993] 3 WLR 927: see paras 39-43 above.

[83] [1994] 1 WLR 15: see para 44 above.

[84] LCCP No 135, paras 3.156-3.167.

[85] See para 40 above, and LCCP No 135, paras 3.157-3.158.

[86] Paras 3.156-3.167.

47. The statutory offence of causing death by reckless driving, the ingredients of which were held by the House of Lords to be identical to those of "reckless" manslaughter, has now been abolished, by the Road Traffic Act 1991, and replaced by an offence of causing death by driving *dangerously*. This change was part of the recommendations of a comprehensive study by the Road Traffic Law Review Committee.[87]

48. The North Report advised that there should be a change from offences of reckless driving to a new hierarchy of offences which focused on the manner of the driving of the accused rather than on his or her state of mind. This approach would avoid the problems associated with "recklessness", which were described in the Report.[88]

49. The Report's proposals were implemented by the Road Traffic Act 1991, which substituted for the statutory offence of causing death by reckless driving an offence of causing death by driving dangerously, in the following terms:

> 1. A person who causes the death of another person by driving a mechanically propelled vehicle dangerously on the road or other public place is guilty of an offence.
>
> 2. ...
>
> 2A.--(1) For the purposes of sections 1 and 2 above a person is to be regarded as driving dangerously if (and, subject to subsection (2) below, only if)--
>
> (a) the way he drives falls far below what would be expected of a competent and careful driver, and
>
> (b) it would be obvious to a competent and careful driver that driving in that way would be dangerous.
>
> (2) A person is also to be regarded as driving dangerously for the purposes of sections 1 and 2 above if it would be obvious to a competent and careful driver that driving the vehicle in its current state would be dangerous.
>
> (3) In subsections (1) and (2) above "dangerous" refers to danger either of injury to any person or of serious damage to property; and in determining for the purposes of those subsections what would be expected of, or obvious to, a competent and careful driver in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but

[87] (1988): the "North Report": see LCCP No 135, paras 3.160-3.163.

[88] North Report, paras 5.7-5.9, and see also LCCP No 135, paras 3.160-3.162.

also to any circumstances shown to have been within the knowledge of the accused... .

50. This section, then, imposes a gross negligence test. The defendant's conduct is to be judged in relation to an external standard, that of a competent and careful driver; and his conduct has to fall *far* below that standard in order for him to be guilty of the offence.

51. In the event, therefore, the North Committee's aim of producing a hierarchy of offences, with common law manslaughter retained to address the most serious conduct of all, has not been realised in practice. *Prentice* made it clear, if it was not clear already, that the *Lawrence* test, with all its difficulties, remained the relevant test for motor manslaughter. But *Prentice* also made it clear, by the contrast the Court of Appeal then made between *Lawrence* motor manslaughter and the "gross" negligence which applies in the rest of the law of manslaughter, that motor manslaughter imposes a standard lower, not higher, than that of the new offence of driving dangerously.[89]

52. For these reasons, coupled with the obvious disquiet which is apparent in the Court of Appeal's judgment in *Prentice*, we undertake, in Part V of the Consultation Paper,[90] a critical review of the law of motor manslaughter and make some provisional proposals for the reform of this law.

Recklessness as a former element of the law of murder

53. In Part III of the Consultation Paper, and therefore in this Summary also, we have been mainly concerned with the dividing line between manslaughter and the accidental causing of death. However, it must not be forgotten that at the upper end of the scale of seriousness a demarcation must also be made between manslaughter and murder.[91]

54. The law of manslaughter was affected in 1985 by the decision in a murder case, *Moloney*,[92] in which the House of Lords held that cases in which the defendant may have foreseen that death or really serious injury would result from his act, without intending such consequences, would no longer constitute murder, and would therefore fall by default into the category of cases of involuntary manslaughter. This class of case was described by Lord Lane CJ in *Hancock*[93] as

[89] Whereas the North Committee (at paras 6.12-6.13 of their Report) appeared to conclude that their recommendation of the replacement of causing death by reckless driving by the new dangerous driving offence would create a distinction in English law between manslaughter and the statutory offence, with manslaughter the more serious of the two: see LCCP No 135, paras 3.166-3.167.

[90] Paras 5.22-5.29.

[91] LCCP No 135, paras 3.168-3.170.

[92] [1985] AC 905.

[93] [1986] 1 AC 455.

where the defendant's motive or purpose is not primarily to kill or injure, but the methods adopted to achieve the purpose are so dangerous that the jury may come to the conclusion that death or injury to some third party is highly likely.[94]

55. Any statutory definition of manslaughter must include, at the top end of the scale, those cases which no longer fall within the offence of murder as a result of the decision in *Moloney*. This matter is taken up in Part V of the Consultation Paper.[95]

THE LIABILITY OF CORPORATIONS

56. We decided to devote particular attention, in Part IV of our Consultation Paper, to the issue of corporate liability for manslaughter, because all the recent cases which have evoked demands for the use of the law of manslaughter following public disasters have involved, actually or potentially, corporate defendants. On the only occasion on which such a case has been brought to trial,[96] the difficulties of the law of manslaughter were compounded by the obscurities of the law of corporate criminal liability. This position is very unsatisfactory because the technical structure of the law is in effect preventing very serious policy issues from even being considered.

57. In Part IV of our Consultation Paper, which we summarise here, we therefore examine the present law before turning, in Part V, to consider the policy which should underlie it. We should make it clear at the outset that we are considering corporate liability in the context of gross negligence manslaughter only, because our provisional view, expressed in Part II of the Paper, is that we should not recommend the continuation of unlawful act manslaughter as a separate category of liability.[97] A fortiori, it cannot be rational or just to use the very wide rules of unlawful act manslaughter to impose criminal liability for manslaughter on corporations in whose operations a death has been caused on the basis that these operations involved an illegality of some kind or other, and we know of no-one who suggests that the law should extend so far.

58. In Part IV of the Paper, and in this Overview, we first briefly outline the general law of corporate liability,[98] before turning to consider the question of corporate liability for manslaughter in particular.[99] There appear to have been only three prosecutions of a

[94] [1986] 1 AC 455, 459.

[95] At paras 5.16-5.21.

[96] Against P&O European Ferries (Dover) Ltd following the Zeebrugge disaster, sub nom *Stanley and others* (CCC, October 1990).

[97] See para 15 above.

[98] LCCP No 135, paras 4.5-4.20.

[99] LCCP No 135, paras 4.21-4.45.

corporation for manslaughter in English law,[100] and none of them have resulted in a conviction. In order to shed light on the deep-seated problems inherent in the present law, we analyse the reasons for the failure of the most recent of these prosecutions, the case against P&O European Ferries (Dover) Ltd, following the Zeebrugge disaster.[101] This prosecution failed despite the very serious findings of a judicial enquiry,[102] that:

> There appears to have been a lack of thought about the way in which the *Herald* ought to have been organised for the Dover/Zeebrugge run. All concerned in management, from the members of the Board of Directors down to the junior superintendents, were guilty of fault in that all must be regarded as sharing responsibility for the failure of management. From top to bottom the body corporate was infected with the disease of sloppiness... .[103]

The general law of corporate liability

59. It is trite law that a corporation is a separate legal person,[104] but it has no physical existence and it cannot, therefore, act or form an intention of any kind except through its directors and servants. There has never been any doubt that the members or officers of a corporation cannot shelter behind the corporation and they may be successfully prosecuted as individuals for any criminal acts they may have performed or authorised. The real problem is the extent to which the corporate body itself may be criminally liable.

60. The earliest recognised form of corporate crime involved the failure of a corporation to perform an absolute duty imposed upon it by law.[105] Later, judges built on the rules of vicarious liability in order to impose liability upon corporations for the positive acts of their employees.[106] This doctrine, originally developed in the law of tort, was limited in its application to the criminal law, and, with a few exceptions, a master could generally only be held guilty of his servant's criminal acts in accordance with the ordinary principles of secondary participation in crime. Even where one of the exceptions applied, it was not possible to impute the employee's state of mind to the employer. Unless, therefore, the employer himself had the requisite mental element for an offence,[107] vicarious criminal liability was limited to offences of strict liability.

[100] *Cory Bros Ltd* [1927] 1 KB 810; *Northern Strip Mining Construction Co Ltd, The Times* 2, 4 and 5 February 1965; *P&O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72.

[101] LCCP No 135, paras 4.24-4.31 and 4.38-4.42; and paras 64-67 of this Overview.

[102] MV Herald of Free Enterprise: Report of the Court No 8074, Department of Transport (1987) ("the Sheen Report").

[103] *Ibid*, para 14.1.

[104] *Salomon v Salomon* [1897] AC 22.

[105] For example, *Birmingham & Gloucester Rly Co* (1842) 3 QB 223: see LCCP No 135, para 4.7.

[106] For example, in *Great North of England Rly Co* (1846) 9 QB 315: see LCCP No 135, paras 4.8-4.10.

[107] "Mens rea".

The principle of identification

61. A substantial change in this law took place with three cases[108] in the early 1940s which held that a corporation could be held directly guilty of a criminal offence, in circumstances in which the doctrine of vicarious liability could not apply. These cases established in English law what is now known as "the principle of identification". This principle allows the acts and mental states of senior personnel within a corporation, the "controlling officers", to be attributed to the corporation itself. The reasoning behind this principle is that a corporation "must act through living persons...Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company."[109] By way of this principle it is possible to impose criminal liability on a corporation, whether as perpetrator or accomplice, for most criminal offences, notwithstanding that mens rea is required.

Corporate liability for manslaughter and the failure of the prosecution against P&O

62. However, the principle of identification does not extend to all crimes. Some crimes, such as bigamy, by their very nature can only be committed by a natural person; and a corporation cannot be convicted of a crime for which death or imprisonment are the only punishments.[110]

63. For some time there was doubt whether manslaughter was a member of this class of crimes, because it was believed that a corporation could not be guilty of a felony or a misdemeanour which involved personal violence.[111] However, in an unreported case in 1965 at Glamorgan Assizes[112] neither counsel nor the judge appeared to have any doubt about the validity of an indictment which alleged gross negligence manslaughter against a corporate defendant. The issue was not, however, fully discussed, and earlier authorities were not considered, so that some uncertainty still lingered.

64. The question whether a corporation could properly be charged with manslaughter was finally decided in the criminal proceedings brought against P&O European Ferries (Dover) Ltd after the Zeebrugge ferry disaster.[113] Turner J held in that case that an indictment for manslaughter could lie against the company, because it would be possible to impute the mens rea required for manslaughter to it by "identifying" it with one of its

[108] *DPP v Kent and Sussex Contractors Ltd* [1944] KB 146; *ICR Haulage Ltd* [1944] KB 551; and *Moore v Bresler* [1944] 2 All ER 515: see LCCP No 135, paras 4.11-4.19.

[109] *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, per Lord Reid at p 170: see LCCP No 135, paras 4.17-4.19.

[110] *Halsbury's Laws of England* (4th ed, 1990) vol 11(1) para 35, and see LCCP No 135, para 4.21.

[111] *Cory Bros Ltd* [1927] 1 KB 810: see LCCP No 135, para 4.22.

[112] *Northern Strip Mining Construction Co Ltd, The Times* 2, 4 and 5 February 1965: see LCCP No 135, para 4.23.

[113] *P&O European Ferries (Dover) Ltd* (1991) 93 Cr App R 72 (CCC): see LCCP No 135, paras 4.24-4.30.

controlling officers. In order to convict the company it was, therefore, necessary to prove that one of its controlling officers had been guilty of manslaughter.

65. However, in that case the prosecution was unable to find sufficient evidence on which to convict any of these senior personnel, and so the judge ultimately had to direct the jury to acquit the company. In coming to this conclusion, he ruled against the adoption into English law of the "principle of aggregation".[114] This principle would have enabled the faults of a number of different individuals, none of whose faults would individually have amounted to the mental element required for manslaughter, to be aggregated, so that in their totality they might have amounted to such a high degree of fault that the company could have been convicted of manslaughter.

66. It was not possible to convict any of the individual officers of the company because there was insufficient prosecution evidence to justify a finding that the risk of the vessel putting to sea with her bow doors open was "obvious", within the *Caldwell/Lawrence* definition of recklessness which was, at the time of the case, thought to be the ruling law for manslaughter.[115]

67. The judge held that the appropriate test of "obviousness" in this case was:

> ...what the hypothetically prudent master or mariner or howsoever would have perceived as obvious and serious.[116]

This test required the conduct of the defendants to be judged against the prevailing standards of the industry. If the risk would not have occurred to any ships' captain at that time, as the evidence adduced in the case tended to show, the defendants could not be convicted by reason of their failure to advert to it. In paragraph 4.43 of our Consultation Paper we note that the *Bateman* test for gross negligence manslaughter also requires the defendant's conduct to be judged against the practices of the relevant profession or industry. Whether an exclusive concentration on the standards of the industry in question is a helpful approach is one of the matters which we consider in Part V of our Consultation Paper.

[114] *R v Stanley and others* 19 October 1990 (CCC) transcript p 2: see LCCP No 135, paras 4.31-4.37.

[115] See paras 34-38 above, and LCCP No 135, paras 4.38-4.41.

[116] *R v Stanley and others* 10 October 1990 (CCC), transcript p 18F.

SUMMARY OF OUR PROVISIONAL PROPOSALS FOR REFORM

68. Part V of of our Consultation Paper contains a detailed examination of the policy issues and arguments raised by this field of law, which leads to our provisional proposals for reform, which are summarised here. Readers may find it interesting and helpful to read that Part in full, even if it is the only part of the Consultation Paper which they do read.

69. We invite comments on any of the matters contained in, or on the issues raised by, the whole of our Consultation Paper, and not just the matters which are, for ease of reference, very briefly summarised in this Outline.

A. Unlawful act manslaughter

70. For the reasons set out in paragraphs 2.52-2.56 and 5.1-5.7 of our Consultation Paper, we provisionally propose the abolition of this head of manslaughter. We invite comment from any readers who think that it should be retained, and if so we ask them to state with clarity what form they believe the law should take, bearing in mind all the difficulties to which we have drawn attention in Part II of our Paper.

71. However, despite our provisional view that unlawful act manslaughter should be abolished, we seek the views of consultees[117] on the question whether there is a feeling prevalent amongst the general public that where a person has caused the death of another by an act of violence, he or she should be dealt with more severely because of the accident that death was caused by that act; and whether this feeling should properly influence the criminal law. In case consultees answer both these questions in the affirmative, we provisionally suggest[118] an offence of causing death in the following terms:

> A person is guilty of an offence if he causes the death of another intending to cause injury to another or being reckless as to whether injury is caused.

We seek the views of consultees on the advisability of creating an offence of this type; on the formula we have provisionally suggested; on the level of penalty which such an offence should attract; and on an appropriate name for the suggested new offence.[119]

[117] LCCP No 135, paras 5.8-5.9.

[118] LCCP No 135, para 5.12.

[119] LCCP No 135, para 5.15.

B. Manslaughter by subjective recklessness

72. We provisionally propose a separate category of reckless manslaughter, defined in terms of a person causing the death of another while being subjectively reckless whether death or serious personal injury would be caused. "Recklessness" would bear the same meaning as that adopted in the Draft Code and in clause 1(b) of our Report on Offences against the Person,[120] that the accused was aware of the risk that death or serious injury would occur, and unreasonably took that risk: see paragraphs 5.16-5.21 of our Consultation Paper for the reasoning behind this proposal.

C. Motor manslaughter

73. For reasons set out in paragraphs 5.22-5.29 of our Consultation Paper, we do not think the present law of manslaughter while driving a motor vehicle is satisfactory. However, we invite comment from any reader who considers that the present law should remain unamended.

74. The first of our alternative proposals for reform is the disapplication of the offence of gross negligence manslaughter to killings by use of motor vehicle altogether, leaving the statutory offence of causing death by dangerous driving, and our proposed offence of manslaughter by subjective recklessness, as the only possible charges in such a case: see paragraphs 5.25-5.26 of our Consultation Paper.

75. The other alternative proposal is the reversal of the decision in *Seymour*, which held that *Caldwell* recklessness was the mental state required for motor manslaughter. The effect of this provisional proposal, discussed in paragraphs 5.27-5.29 of our Consultation Paper, would be to bring motor manslaughter within the general law of manslaughter (for which we make provisional proposals summarised in the following paragraphs).

D. The general law of manslaughter

76. The first issue, discussed in paragraphs 5.31-5.32 of our Consultation Paper, on which we invite comment is whether there should be a law of involuntary manslaughter at all.

77. Secondly, if it is accepted that there should be a law of involuntary manslaughter, should it extend beyond the category of subjectively reckless killing? This issue is discussed in paragraphs 5.33-5.43 of our Consultation Paper.

78. Thirdly, if consultees accept the legitimacy of a general offence of manslaughter not limited to conscious risk-taking, we invite comment on the appropriate form of such an offence. We make various provisional proposals with regard to this issue, which are summarised in the following paragraphs.

79. For reasons which should be apparent from our account of the existing law in Part IV of of our Consultation Paper (summarised in paragraphs 16-44 of this Overview) in

[120] (1993) Law Com No 218.

paragraph 5.44 of that Paper, we propose that a fresh start, the enactment of a new offence, is required.

80. In paragraph 5.45 of our Consultation Paper, we suggest that it would be inappropriate to formulate separate tests targeted at different types of activity (for example, a doctor treating a patient or a ships captain sailing a vessel). Instead we provisionally propose that a single offence should apply equally to all forms of activity.

81. In paragraph 5.57 of our Consultation Paper we summarise the elements of that offence:

> 1. The accused ought reasonably to have been aware of a significant risk that his conduct could result in death or serious injury.
>
> 3. His conduct fell seriously and significantly below what could reasonably have been demanded of him in preventing that risk from occurring or in preventing the risk, once in being, from resulting in the prohibited harm.

Whilst we invite general comment on this provisional formulation, the following particular issues (discussed in paragraphs 5.49-5.54 of our Consultation Paper) arise in connection with it:

82. Is it appropriate that the offence should be formulated in terms of a significant risk of serious injury as well as of death?

83. Will the fact that death occurred lead juries inevitably to assume that there must have been a serious risk of what in fact happened?

84. Is it appropriate that the risk should be defined as "significant" or "substantial", rather than, perhaps, "obvious"?

85. We do not believe that the proposed requirement that the accused's conduct "fell seriously and significantly below what could reasonably have been demanded of *him*" would exclude a critical review of the practice and attitudes of an industry as a whole. Is this approach valid, and, if so, should it be made explicit in any legislation?

86. The proposed formula avoids the terminology of "gross negligence" and "recklessness" and instead requires that the accused's conduct "fell seriously and significantly below what could reasonably have been demanded of him". How far is it possible and desirable to spell out this test in more detail?

87. We particularly invite comment on the specific considerations affecting this provisional offence, which are set out in paragraphs 5.65-5.69 of our Consultation Paper.

E. Punishment

88. The present maximum penalty in all cases of manslaughter is life imprisonment. In paragraph 5.71 of our Consultation Paper we suggest that a maximum penalty of ten years would be sufficient for negligent manslaughter, although life imprisonment should be retained for manslaughter by subjective recklessness. We invite comment.

F. Corporate liability for manslaughter

89. In paragraph 5.73 of our Consultation Paper we suggest that there is no justification for applying to corporations a different law of manslaughter from that which would apply to natural persons.

90. We provisionally propose a special regime applying to corporate liability for manslaughter, in which the direct question would be whether the *corporation* fell within the criteria for liability of the offence summarised in paragraph 81 above. The detailed application of this regime is discussed in paragraphs 5.74-5.92 of our Consultation Paper. We invite comment on all aspects of this discussion.

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